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U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 01 084 52402

Office: CALIFORNIA SERVICE CENTER

Date:

JAN 09 2003

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act,
8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is described as a tour agency. The petitioner seeks to employ the beneficiary temporarily in the United States in the capacity of a manager or executive, namely as its general manager. The director determined that the petitioner had not established that the beneficiary would be employed primarily in a qualifying managerial or executive capacity.

On appeal, counsel presents a brief.

It is noted that the record contains a properly signed Form G-28, Notice of Entry of Appearance as Attorney or Representative, dated January 5, 2000. A second Form G-28 submitted with the appeal is dated September 15, 2001; however, the second form is signed by a new representative and the beneficiary, and is not signed by the petitioner's representative, as indicated in the initial petition's submission.

8 C.F.R. 292.4 states, in pertinent part:

During proceedings before the Service, substitution may be permitted upon the written withdrawal of the attorney or representative of record, or upon notification of the new attorney or representative.

No written withdrawal of the first attorney is included in the record.

Further, 8 C.F.R. 103.3(a)(1)(iii)(B) states, in pertinent part:

Meaning of affected party. For purposes of this section and sections 103.4 and 103.5 of this part, affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition. An affected party may be represented by an attorney or representative in accordance with part 292 of this chapter.

8 C.F.R. 103.3(a)(2)(i) states, in pertinent part: "The affected party shall file an appeal on Form I-290B." 8 C.F.R. 103.3(a)(2)(v) states:

Improperly filed appeal--(A) Appeal filed by person or entity not entitled to file it--(1) Rejection without refund of filing fee. An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the

Service has accepted will not be refunded.

8 C.F.R. 103.2(a)(3) states, in pertinent part:

An applicant or petitioner may be represented by an attorney in the United States...A beneficiary of a petition is not a recognized party in such a proceeding...Where a notice of representation is submitted that is not properly signed, the application or petition will be processed as if the notice had not been submitted.

The appeal has not been filed by the petitioner, nor by any entity with legal standing in the proceeding, but rather, by counsel for the beneficiary. Therefore, the appeal has not been properly filed. However, in the interest of due process, the matter will be reviewed on certification pursuant to 8 C.F.R. 103.4. The initial Form G-28 is the only appropriately filed Form G-28, and will be recognized as such.

To establish L-1 eligibility under Section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and seeks to enter the United States temporarily to continue to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that

the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue in this proceeding is whether the beneficiary will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;

- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;

- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The Form I-129, Petition for a Nonimmigrant Worker, was filed on January 22, 2001. The petition indicates that the petitioner has been in business since 1994, and that it plans to pay the beneficiary a salary of \$48,000.00 per year. The record also indicates that: the beneficiary (and spouse) had previously been in L-1 status from December 1, 1997 through April 15, 2000; the beneficiary last entered the United States at Agana, Guam, as an L-1 on April 1, 2000; and, the beneficiary is currently in B-2 tourist status. The petitioner indicates that the beneficiary has been the owner and manager of a restaurant business in Korea since 1993. The petitioner also indicates that the beneficiary is to manage and direct tour agency operations in Guam, and that the beneficiary is the sole proprietor of the foreign entity in Korea and the majority owner of the petitioner.

The petitioner states that the beneficiary purchased the controlling interest in the petitioner in 1995 and obtained L-1A non-immigrant status in 1997. The petitioner states that the beneficiary decided not to renew the petition at the time of its expiration because he wanted to concentrate his efforts on his Korean business enterprise. The petitioner subsequently determined that he must again turn his attention to the Guam entity and decided to file another L-1A petition. The petitioner states that the beneficiary is currently in Guam in B-2 tourist status and desires to change status without departure from Guam, noting that the beneficiary was inadvertently admitted as a visitor for pleasure rather than as a B-1 visitor for business. It is noted that the beneficiary's last L-1A visa expiration date was on April 15, 2000, and that the instant petition was filed on January 22, 2001.

Included in the record is a "Certificate of Business Report" dated July 20, 1996, for the foreign entity, indicating gross income as 16 million Korean won for the year ending on June 30, 2000. The petitioner provides no indication of the currency exchange rate at the time the statement was compiled. A Profit and Loss Statement for the foreign entity for the year ending June 30, 2000, also is included in the record.

The petitioner states that the United States company grossed over \$82,000.00 in sales in 1999, and that it holds over \$46,000.00 in

total assets. The petitioner also states that it employs two individuals.

A 1999 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, indicates that the petitioner earned \$82,388.00 in gross income, with \$6,600.00 paid in wages and salaries and no compensation paid to any officers. Net income after deductions is reported as \$7,878.00, with \$22,000.00 indicated as paid in commissions.

The petitioner also has included a Department of Revenue and Taxation, Employer Quarterly State Wage Report, for the quarters ending September 30, 2000, December 31, 2000, and March 31, 2001, indicating that it employed two individuals during these quarters. The petitioner states that the company is small and currently only employs two individuals, and that:

... [redacted] intends to take direct control and management of [redacted]. The company is a tourist agency, catering primarily to tourists primarily from Korea referred by [redacted] in Korea, an entity that [redacted] established in August 2000 to augment the U.S. company, ... In his managerial capacity, [redacted] will establish the policies which govern operations, maintain financial control, and hire and fire employees as business needs dictate. [redacted] will oversee, direct, and control the activities [sic] of the company; therefore, he is a personnel manager, as well as overseeing the essential function of the company and its end product, which is to provide quality services to customers in the arrangement of tour packages, food, lodging, sightseeing, and shopping, to insure the enjoyment of their visit to Guam, and enhance the profitability of the company...

[While the petitioner] may, from time to time, assist in the operational aspects of the business, his primary responsibility, as majority owner and senior manager, to which his time and energies are substantially devoted [sic], is to formulate policy and plans to develop and control operations governing the purpose of the business, which is to provide efficient, comprehensive services to customers, and to ensure the growth and prosperity of the company.

Here, the petitioner states that the beneficiary's previous L-1 visa status was not renewed because the Korean tourist trade to Guam was poor due to the effect of the Korean Airlines crash in August 1997. The petitioner states that since that time there have been no Korean Airlines flights to Guam, yet the tourist trade has recently increased. In addition, the petitioner states that the Korean airline plans to expand its route again to Guam.

Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner states:

In view of these developments, [REDACTED] intends to revitalize [REDACTED] take advantage of this growing trend. As the business grows, staffing levels will increase.

...As the senior manager, [REDACTED] will direct and control the activities of the two current employees, whose duties are to meet and greet arriving tourists, function as van drivers, conduct scheduled tours, and see to their welfare during their stay in Guam. He will also be involved in promotional activities to further the growth of the business.

Also included in the record is a business license issued to the petitioner on October 4, 2000, to operate a tour service. No explanation of the petitioner's apparent lack of licensure or its ability to conduct business from 1994 through 2000, or during the time of the beneficiary's initial L-1A petition approval, is included in the record.

On appeal, new counsel raises the issue that an Asian economic crisis in late 1997 impacted upon Guam's tourist industry, since many of the tourists to Guam are from Japan and Korea. Counsel adds that hundreds of tour companies ceased operations due to this economic slump, but that the petitioner was one of only five Korean tour companies that survived. Counsel states:

Understandably, the [REDACTED] income and number of employees during this period mirrored that of whole tourism industry of Guam. Everyone cut costs, laid off people, and whatever else was necessary to keep the business going.

Counsel states that during this recession, the petitioner employed only two other people, but maintained the beneficiary in a managerial position during this entire time. Counsel also states that tour agencies on the island of Guam operate in a "different" manner, and that the earnings statements for the two employees are not an accurate reflection of the actual income that they earned, given that the majority of tour guides in Guam receive no wages from their employers, but derive most of their income from commissions. Counsel states that the businesses that derive the income from the tourists pay the tour guides a direct commission. These guides then take their agreed-upon commission and provide the rest of their income to the agency that employs

them. Counsel asserts that an experienced guide can earn an income of \$5,000 to \$10,000 per month as independent contractors. Counsel also asserts that those who do receive salaries are considered to be supervisors and are responsible for "front-line" duties. Counsel states that the petitioner, therefore, is not in direct contact with the tourists, and in fact:

...the tourist industry protocol does not allow the manager or owner of the tour companies from [sic] dealing with tourists directly because that would be impinging on tour guide's territory.

Counsel states that the beneficiary performs the "...essential managerial duties necessary to maintain a close working relationship with affiliated tour agencies in Korea and major vendors in Guam." Counsel also states that there has been an upsurge in tourist travel since 1999, and that involvement in the Internet also has increased the petitioner's business. Counsel adds that the resumption of travel by Korean Airlines to Guam also will aid in the petitioner's growth. Counsel reiterates that the beneficiary is functioning in a managerial capacity, and is too busy to do anything else, with the salaried employees and guides handling the day-to-day operations. No evidence of these assertions of counsel is included in the record. The assertions of counsel do not constitute evidence. Matter of Laureano, 19 I&N Dec. 1, 3 (BIA 1983); Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1990).

On appeal, counsel has submitted a "tour agent addendum" between [REDACTED] Here, the beneficiary is listed as the president [REDACTED] However, no relationship between the petitioner and any [REDACTED] has been established. Also included in the record is a letter dated July 16, 2001, from the Onward Beach Resort to [REDACTED] offering campaign package rates for the period of July 20, 2001 through December 20, 2001. Another letter dated April 18, 2001, from the Guam Reef Hotel, also offers special rates to Palm Palm Tours for the season of May to December 2001. Other letters from five additional hotels offer room rates for various dates in 2001. These letters all appear to be standard seasonal offerings from hotels to tour agencies.

Other documentation contained in the record is in a foreign language with no certified translation into the English language provided. 8 C.F.R. 103.2(b)(3) states that any document containing foreign language submitted to the Service shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English.

On appeal, counsel also has submitted the petitioner's 2000

Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return, dated September 16, 2001, indicating \$152,483.00 in total gross income, with \$33,000.00 paid in wages and salaries, and no compensation paid to officers. Also included in the record on appeal, is a copy of the petitioner's Quarterly State Wage Report for the period ending June 30, 2001, indicating a total of six employees, including the beneficiary. Each employee earned \$3,000.00 during this quarter, with the beneficiary earning \$6,000.00.

This documentation was not in existence at the time the petition was filed on January 22, 2001. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971).

The petitioner has provided insufficient evidence to demonstrate that the beneficiary's duties will be primarily managerial or executive in nature. A manager or executive may manage or direct the management of a function of an organization. However, it must be clearly demonstrated that the function is not directly performed by the manager or executive. The petitioner has not established that the beneficiary functions at a senior level within an organizational hierarchy. The petitioner has not demonstrated that the beneficiary manages or directs the management of a department, subdivision, function, or component of the organization. The petitioner has not established that the beneficiary will manage a subordinate staff of professional, managerial or supervisory personnel who will relieve him from performing the services of the corporation. The evidence in the record does not demonstrate that the beneficiary has been employed abroad or will be involved in something other than performing the day-to-day functions and operational activities of the company. Upon review, it cannot be found that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity. For this reason, the petition may not be approved.

Beyond the decision of the director, the record fails to establish that a qualifying relationship exists between the United States entity and the foreign entity. There also is insufficient evidence in the record to establish that the foreign entity continues to be engaged in the regular, systematic, and continuous provision of goods and/or services pursuant to 8 C.F.R. 214.2(l)(1)(ii)(H).

While the petitioner indicates that this is a subsidiary relationship, the record reflects a representation most closely resembling that of an affiliate relationship. The petitioner asserts that the beneficiary owns and controls both the foreign and the United States entities, and that these entities are both doing business. The petitioner also states that the beneficiary established a travel agency in Korea in August 2000, to work with

the petitioner's business in Guam, and that the beneficiary owns 25 percent of the new business.

Included in the record is a translated "Certificate of Business Registration" dated February 1, 1993, for a restaurant business named [REDACTED] [the foreign entity]. The record also includes an "Incorporation Certificate" dated September 27, 1994, from the Government of Guam, indicating the petitioner's incorporation as [REDACTED]. The Articles of Incorporation dated September 23, 1994, indicate the petitioner's authorized capital as \$100,000.00, with 10,000 shares of stock to be issued. First directors of the corporation are listed as Hyon Su Shin and Shin Dok Chang, each with 1,500 shares of stock, and Mi Hye Koo, with 10 shares. A record of a special meeting of the Board of Directors and Shareholders, indicates that 2,700 shares were transferred to the beneficiary on May 15, 1995, with 1,500 shares transferred from one of the shareholders and another 1,200 from the other. Both of these stockholders also resigned from the corporation on that date. At that time, the beneficiary was elected as the President, Secretary, and Director of the petitioner. A Chong Son Yi received the other 300 shares of the initial stock issuance. No additional explanation of the remaining 6,990 shares of stock is offered.

It is noted that on the 1999 IRS Form 1120, Schedule J attachment, the petitioner indicates that at no time during the tax year that any one foreign person owned, directly or indirectly, at least 25% of (a) the total voting power of all classes of stock of the corporation entitled to vote, or (b) the total value of all classes of stock of the corporation.

On appeal, the petitioner's 2000 IRS tax document, Schedule J, Tax Computation, also indicates conflicting ownership of the petitioner. This document also indicates that no foreign person owned 25 percent or more of the business, that no one individual owned, directly, or indirectly, 50 per cent or more of the company's voting stock, nor that the business is a subsidiary.

In a request for additional evidence, the director had requested documentation to indicate actual purchase of the petitioner's stock and stock certificates. The director also had requested documentation that would more clearly delineate the duties of the beneficiary and responsibilities of the position for the petitioner, an accountability of time spent in each duty listed, and an organizational chart of the petitioner.

Almost none of this documentation was submitted. In response, the petitioner submitted an additional copy of its special meeting minutes and two notes of receipt from the sellers of the stock. The petitioner also submitted a copy of the stock certificates for the sale of stock directly to the beneficiary, and not to a foreign entity. This stock certificate is dated May 1, 1995, and numbered "No. 1" for 2,700 shares. No explanation

has been furnished to indicate how the stocks could have been renumbered to begin with stock issue "No. 1" again, although at least three different shareholders owned stock prior to this transaction with the beneficiary. It is noted that the other two certificates for the issue of the 300 and 10 other outstanding shares of stock also are dated May 1, 1995, and are numbered "2" and "3," even though the record indicates that the stock issue for the 10 shares occurred in 1994.

These discrepancies call into question the petitioner's ability to document the requirements under the statute and regulations. Doubt cast on any aspect of the evidence as submitted may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. Further, it is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth lies, will not suffice. Matter of Ho, 19 I&N Dec. 582. (Comm. 1988).

The petitioner states:

██████████ also paid an additional \$23 thousand to purchase the equipment of the existing company, for a total investment of \$50 thousand. ██████████ was and is currently the sole proprietor of a restaurant business in Korea. ██████████ states that he brought the funds, generated from his Korean business, to Guam for the purchase of ██████████ in the form of travelers checks. He states he did not retain copies of those checks as he saw no need to do so at that time. The evidence on hand, then of his ownership of ██████████ are the documents noted. Also attached are the stock certificates of the current stockholders. ██████████ has held the controlling interest in ██████████ since 1995.

No other evidence of the transactions regarding the purchase of the petitioner is included in the record. Proof of ownership of the foreign entity is presented through statements and partial documentation only.

In addition, the petitioner states:

... ██████████ was employed abroad for more than one of the three years preceding his initial grant of L-1A status, in a managerial capacity, and will, upon approval of this application, resume a managerial role with the U.S. subsidiary of his Korean business.

However, this is a new petition, and the following determinations can be made:

- (1) the petition was filed on January 22, 2001, less than one year after the beneficiary's last L-1A petition expiration date;
- (2) the record indicates that the beneficiary was absent from the United States for [at most] less than six months (from the date of expiration of his L-1 visa on April 15, 2000 to the date of his admission as a B-2 on October 8, 2000); and
- (3) the beneficiary was in L-1A status from December 1997 through April 15, 2000.

This precludes a finding that the beneficiary was employed abroad for at least one continuous year of full-time employment with a qualifying organization within the three years preceding the filing date of the instant petition, as required under 8 C.F.R. 214.2(1)(3)(iii). As the appeal will be dismissed on the grounds discussed, these issues need not be examined further.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.